

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

BREATHABLEBABY, LLC,
a Minnesota company,

Civil File No. _____

Plaintiff,

JURY TRIAL DEMANDED

v.

SUMMER INFANT, INC.,
a Delaware corporation,

Defendant.

**COMPLAINT FOR PATENT INFRINGEMENT, TRADEMARK INFRINGEMENT,
UNFAIR COMPETITION, AND DECEPTIVE TRADE PRACTICES**

Plaintiff BreathableBaby, LLC (“BreathableBaby”) brings this Complaint against Summer Infant, Inc. (“Summer Infant”) to stop and remedy Summer Infant’s willful infringement of BreathableBaby’s United States patent rights relating to its air permeable infant bedding technology. BreathableBaby further brings this Complaint to stop and remedy Summer Infant’s intentional infringement of BreathableBaby’s trademark rights, Summer Infant’s deliberate unfair competition, and Summer Infant’s willfully deceptive trade practices. BreathableBaby alleges as follows:

BACKGROUND

1. BreathableBaby is an innovator and pioneer in the field of safer, air permeable infant sleep products. BreathableBaby developed its technology to respond to dangers to infants and small children associated with using certain less air permeable

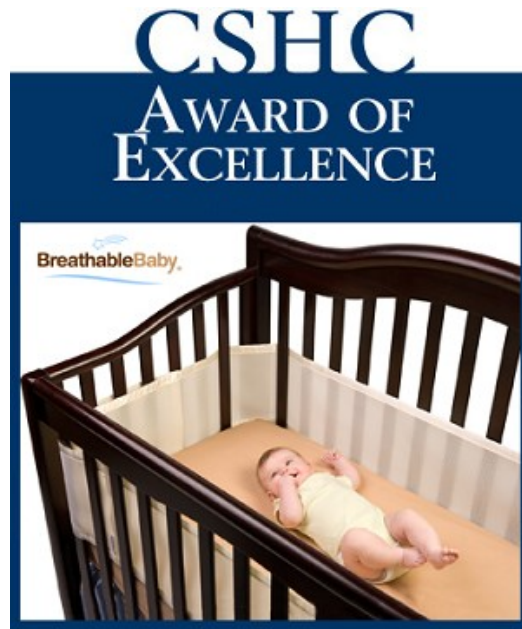
products in sleeping cribs, including less air permeable soft crib “bumpers.” Pediatricians and child-safety advocates have recommended against using soft, lower permeability crib bumpers due to the risk of infants and babies suffocation if they become pressed up against the less air permeable material for a prolonged period. In September 2007, the American Journal of Pediatrics published a study officially recommending against using soft crib bumpers due to infant and baby safety concerns.

2. In response to these safety concerns, BreathableBaby undertook to develop safer, higher permeable infant sleep technology. BreathableBaby’s products include crib bumpers that provide the benefits of a bumper—for example, protecting infants and young children from injuries that might result when an infant or small child gets an arm or leg trapped between the slats of a crib—but which are made from a greater air permeable material that does not present the greater dangers of suffocation or sudden infant death associated with lower air permeable sleep products.

3. BreathableBaby has received extensive recognition for its products and innovations. BreathableBaby has received United States patents covering its air permeable sleep technology. The company has won multiple awards for its safer sleep products, including multiple Mom’s Best awards and the 2008 Seal of Approval from the National Parenting Center. Child Safety House Calls, a pediatrician-founded organization that promotes only pediatrician-approved products, evaluated BreathableBaby’s crib bumper and gave the product its Award of Excellence for 2009.

4. As a result of its substantial promotion of the BREATHABLEBABY name, consumers recognize the BREATHABLEBABY name and plaintiff BreathableBaby as

the source of products bearing its name. BreathableBaby has valuable trademark rights in the BREATHABLEBABY name.



5. Less than one year ago, Summer Infant approached BreathableBaby about the possibility of acquiring BreathableBaby's valuable assets, including BreathableBaby's patents, trademarks and air permeable technology for unique infant sleep products. The parties met in October 2009 to discuss a potential acquisition. Ultimately, BreathableBaby decided against entering into any such transaction. Summer Infant, within a few months of failing to acquire BreathableBaby, filed a federal trademark application seeking to register the very similar name "BreatheEasy Baby" for use in connection with products in apparent competition with BreathableBaby's products. The specimen that Summer Infant submitted with its trademark application consisted of a fully designed product label, complete with UPC bar code and product warnings, for a "Breathable Mesh Bumper" advertised to "help[] prevent suffocation."

6. Summer Infant, having failed to acquire BreathableBaby or any of its intellectual property, quickly began offering and selling its own crib bumper product. Summer Infant's bumper infringes BreathableBaby's United States patent and trademark rights. Moreover, Summer Infant's bumper packaging is designed to confuse and mislead consumers about the source of the Summer Infant crib bumper, its quality and characteristics, and contains statements which are literally false or have a tendency to deceive consumers.

7. Summer Infant selected the name "BreatheEasy Baby" to mislead, confuse and deceive consumers. The BreatheEasy Baby name is confusingly similar name to the BreathableBaby mark.

8. In addition, Summer Infant's BreatheEasy Baby product packaging imitates BreathableBaby's product packaging to further create mistake, confusion and deception by consumers. For example, the packaging for BreathableBaby's bumper depicts a baby lying in a brown crib surrounded by a bumper, with baby-blue-colored arrows depicting the ability of air to flow through the bumper. The packaging for the BreatheEasy Baby bumper also depicts a baby lying in a brown crib surrounded by a bumper, with baby-blue-colored arrows depicting the purported ability of air to flow through the bumper. A side-by-side view of the packaging is shown below:

BreathableBaby® packaging



BreatheEasy Baby packaging



Moreover, Summer Infant places the BREATHEEASY BABY marks in colors selected to diminish the readability of the word “easy.” The result is a mark “BREATHE BABY.” This display further enhances the likelihood of confusion.

9. Summer Infant’s BREATHEEASY BABY packaging contains statements that the product is made from a “breathable mesh” that “improves air flow and reduces risk of suffocation and entanglement.” These statements are material to consumers. On information and belief, Summer Infant lacks adequate substantiation for its product performance claims.

10. The packaging also bears an apparent certifying seal referencing “Safe N’ Sound Sleep Solutions,” and the seal represents that the product “conforms to recommended guidelines.” The certifying seal on Summer Infant’s packaging is depicted below:



All of these statements are material to consumers.

11. On information and belief, there is no organization, let alone a certifying organization, called "Safe N' Sound Sleep Solutions," and there are no "recommended guidelines" from any such organization. Summer Infant has included its seal to confuse, mislead and deceive consumers into believing that a third-party, certifying or government agency has tested Summer Infant's products and determined that the products conformed to an established set of "recommended guidelines." These statements are not true and are highly material to consumers. Summer Infant's product packaging is literally false and dangerously deceptive.

PARTIES AND JURISDICTION

12. BreathableBaby is a limited liability company organized under the laws of the State of Minnesota with a principal place of business at 1593 Wexford Circle, Eagan, MN 55122-2569.

13. On information and belief, Summer Infant is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at 1275 Park East Drive, Woonsocket, Rhode Island 02895.

14. This action arises under the patent laws of the United States, Title 35 of the United States Code; the federal Lanham Act, 15 U.S.C. § 1051 *et seq.*; and Minnesota statutory and common law. This Court has subject matter jurisdiction over the federal law claims under 28 U.S.C. §§ 1331, 1338(a), 1338(b), and 15 U.S.C. § 1121. This Court has supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367(a).

15. This Court has personal jurisdiction over Summer Infant. Summer Infant, on information and belief, does business throughout the United States, including in this judicial district. Under the Minnesota Long Arm Statute, Minn. Stat. § 543.19, Summer Infant transacts business in Minnesota and/or has committed acts of patent infringement, trademark infringement, and unfair competition within and/or outside Minnesota that have caused injury in Minnesota.

16. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1400(b).

SUMMER INFANT'S PATENT INFRINGEMENT

17. BreathableBaby is an innovator and pioneer in the field of safer air permeable infant bedding technology, including air permeable crib bumpers that help protect infants and young children from harm. BreathableBaby has received United States patents covering its technology.

18. On June 6, 2006, United States Patent Number 7,055,192 (“the ‘192 patent”) entitled “Crib Shield System and Other Breathable Apparatus” was duly and lawfully issued by the United States Patent and Trademark Office with BreathableBaby named as the assignee. A true and correct copy of the ‘192 patent is attached hereto as Exhibit A.

19. BreathableBaby is the owner of the ‘192 patent and has the right to enforce that patent against Summer Infant.

20. BreathableBaby has prominently marked its products advising the public of the application of the ‘192 patent to its products.

21. Summer Infant offers for sale and sells products that infringe one of more claims of the ‘192 patent, including crib bumpers sold under the name BreatheEasy Baby (“infringing products”).

22. Summer Infant is offering for sale and selling the infringing products at, without limitation, Babies “R” Us and Toys “R” Us. The infringing products are offered for sale and sold through the websites at www.toysrus.com and www.babiesrus.com. On information and belief, the infringing products are also offered for sale and sold at Babies “R” Us retail stores.

**SUMMER INFANT’S TRADEMARK INFRINGEMENT, UNFAIR
COMPETITION, AND DECEPTIVE TRADE PRACTICES**

23. BreathableBaby is a Minnesota business that innovates, develops and sells safer bedding products for infants and small children.

24. BreathableBaby owns all trademark rights in the BREATHABLEBABY name under federal, state and common law.

25. BreathableBaby owns United States Trademark Registration No. 3,419,804 for BREATHABLEBABY for use in connection with crib bumpers. The BREATHABLEBABY registration issued on April 29, 2008. The registration is in full force and effect for use of the mark in connection with crib bumpers. The registration is attached hereto as Exhibit B.

26. BreathableBaby is well-known within the industry for its high-quality and innovative products, and the products associated with the BREATHABLEBABY mark are highly respected and highly demanded by consumers.

27. The BREATHABLEBABY mark is inherently distinctive and serves to identify the source of BreathableBaby's products and distinguish those products from the products of other companies. Consumers in Minnesota and elsewhere recognize the BREATHABLEBABY mark and associate the mark with BreathableBaby's products.

28. BreathableBaby, through its use of the BREATHABLEBABY mark and its association of the mark with high-quality and innovative products, has developed extensive goodwill in the BREATHABLEBABY mark.

29. As a result of BreathableBaby's use and promotion of the BREATHABLEBABY mark in Minnesota, BreathableBaby has acquired valuable common law rights in the BREATHABLEBABY mark.

30. In violation of BreathableBaby's federal, state and common-law rights in the BREATHABLEBABY mark, Summer Infant has sold and continues to sell

competing products under the name BREATHEEASY BABY. The use of BREATHEEASY BABY is likely to cause consumer confusion, mistake, and deception as to the source, sponsorship and/or affiliation of Summer Infant's products and BreathableBaby's products.

31. Consumer confusion, mistake or deception is made more likely by Summer Infant's imitation of the packaging associated with BreathableBaby's products. For example, the packaging for BreathableBaby's bumper shows a baby lying in a brown crib surrounded by a bumper, with baby-blue-colored arrows used to depict air flowing through the bumper. Summer Infant's packaging also includes lying in a brown crib surrounded by a bumper, with baby-blue-colored arrows used to depict air flowing through the bumper.

32. Summer Infant deliberately selected packaging that imitates and copies BreathableBaby's packaging. Along with its use of the confusingly similar name BREATHEEASY BABY, Summer Infant's copying of BreathableBaby's packaging is highly likely to confuse, mislead or deceive the public into believing that its BREATHEEASY BABY products are somehow sponsored or endorsed by, or affiliated with, BreathableBaby and the BREATHABLEBABY products. Summer Infant's actions also have a tendency to deceive purchasers and end users into believing that the BREATHEEASY BABY product shares the same qualities and properties as the BREATHABLEBABY products, when, on information and belief, Summer Infant has not subjected its products to the same level of testing or quality-assurance as the BREATHABLEBABY products.

33. Summer Infant is using the confusingly similar name BREATHEEASY BABY and its confusingly similar packaging in an attempt to misappropriate the goodwill, quality and innovation associated with the BREATHABLEBABY mark and BreathableBaby's products. Summer Infant is using BREATHEEASY BABY with actual knowledge of BreathableBaby's rights in the BREATHABLEBABY mark with willful intent to cause confusion, mistake, and deception.

34. There is a strong likelihood of confusion, mistake and deception between Summer Infant's products and BreathableBaby's products arising from Summer Infant's use of the confusingly similar BREATHEEASY BABY name and/or its copying of BreathableBaby's product packaging.

35. Summer Infant has acted deceptively by including on its product packaging statements which are literally false and deceptive and which include claims about health and performance benefits of its products when, on information and belief, Summer Infant has not completed significant or meaningful testing to verify its claims. Summer Infant's misleading packaging includes a seal from "Safe N' Sound Sleep Solutions" representing that its product "conforms to recommended guidelines," when, on information and belief, there is no such organization as "Safe N' Sound Sleep Solutions," there are no such independent guidelines, and Summer Infant has not subjected its crib bumper product to any significant or meaningful testing warranting any such representations.

CLAIM I
INFRINGEMENT OF U.S. PATENT 7,055,192

36. BreathableBaby repeats the allegations above as if fully set forth herein.

37. Summer Infant has been and now is directly infringing, actively inducing others to infringe, and/or contributing to the infringement of the '192 patent in this District and elsewhere by making or having made, using, offering for sale, selling, and/or importing products that infringe one or more claims of the '192 patent, including, at least, crib bumpers sold under the name BreatheEasy Baby, in violation of 35 U.S.C. §271(a).

38. On information and belief, Summer Infant will continue to directly infringe the '192 patent unless and until enjoined by this Court.

39. Summer Infant's infringement of the '192 patent is willful.

40. Summer Infant's acts of infringement have damaged BreathableBaby in an amount to be proven at trial, but in no event less than a reasonable royalty. Summer Infant's infringement of BreathableBaby's rights under the '192 patent will continue to damage BreathableBaby causing irreparable harm, for which there is no adequate remedy at law, unless and until enjoined by this Court.

CLAIM II
FEDERAL TRADEMARK INFRINGEMENT
(15 U.S.C. §1114)

41. BreathableBaby repeats the allegations above as if fully set forth herein.

42. Summer Infant's acts complained of herein constitute infringement of the BREATHABLEBABY registration in violation of 15 U.S.C. § 1114. Summer Infant's acts complained of herein are likely to cause confusion, mistake and/or deception, including but not limited to confusion, mistake and/or deception regarding the source, origin, and/or affiliation of products sold by Summer Infant.

43. On information and belief, actual confusion has arisen as a result of Summer Infant's adoption and use of the BREATHEEASY BABY mark.

44. By infringing upon the BREATHABLEBABY mark, Summer Infant is trading on BreathableBaby's goodwill and good reputation in furtherance of Summer Infant's business.

45. Summer Infant has willfully infringed and sought to appropriate the goodwill associated exclusively with the BREATHABLEBABY trademark.

46. By reason of the aforesaid willful acts of infringement, BreathablyBaby has been irreparably damaged and has no adequate remedy at law. Unless Summer Infant is enjoined, the above-described acts will continue and will impair the value of BreathableBaby's trademark and the good will associated therewith.

CLAIM III
LANHAM ACT VIOLATION
(15 U.S.C. § 1125(a))

47. BreathableBaby repeats the allegations above as if fully set forth herein.

48. Summer Infant's acts complained of herein violate Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Summer Infant has misappropriated BreathableBaby's trademark, imitated its product packaging, and made false representations and designations of origin, all in violation of 15 U.S.C. § 1125(a).

49. Summer Infant's acts are likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of Summer Infant or its products with BreathableBaby and its products. Summer Infant's acts are further likely to cause

confusion, mistake, or deception as to the origin, sponsorship, or approval of Summer Infant's goods and commercial activities.

50. On information and belief, actual confusion has arisen as a result of Summer Infant's product name, packaging elements and product performance claims.

51. On information and belief, Summer Infant has used commercial advertising or promotion, including but not limited to its product packaging, misrepresenting the nature, characteristics, or qualities of Summer Infant's goods or commercial activities. For example, Summer Infant's product packaging asserts certain health benefits associated with Summer Infant's products, and represents or implies that independent testing has been completed to verify that Summer Infant's products "conform[] to recommended guidelines." On information and belief, no such testing has been completed, and there are no such "recommended guidelines." The packaging misleads consumers into believing that testing was completed and that the product conforms to guidelines when, on information and belief, there was no substantial independent meaningful or significant testing for the product claims made and neither the asserted "recommended guidelines" nor the "certifying" entity "Safe N' Sound Sleeping Solutions" exist. All of the challenged statements are material, literally false and/or have a tendency to deceive consumers.

52. BreathableBaby has been injured by Summer Infant's violations of 15 U.S.C. § 1125(a) and has no adequate remedy of law. Summer Infant has been unjustly enriched by its violation of 15 U.S.C. § 1125(a).

53. Summer Infant's violations of 15 U.S.C. § 1125(a) were knowing, deliberate and intentional. Accordingly, BreathableBaby is entitled to a recovery of damages in an amount not to exceed three times its actual damages together with an award of attorneys' fees.

CLAIM IV
VIOLATION OF MINNESOTA DECEPTIVE TRADE PRACTICES ACT
(Minn. Stat. § 325D.44)

54. BreathableBaby repeats the allegations above as if fully set forth herein.

55. Through Summer Infant's acts complained of herein, Summer Infant has violated the Minnesota Deceptive Trade Practices Act, including Minn. Stat. § 325D.44. Summer Infant has caused a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of its goods. Summer Infant has further caused a likelihood of confusion or of misunderstanding as to affiliation, connection, or association with BreathableBaby and BreathableBaby's products.

56. Summer Infant has further used deceptive representations in connection with its products and misrepresented that its products have sponsorship, approval, and characteristics that they do not have, and that its goods are of a particular standard or quality.

57. On information and belief, actual confusion has arisen as a result of Summer Infant's deceptive trade practices.

58. By engaging in the activities complained of, Summer Infant has, and is, engaged in deceptive trade practices within the meaning of Minn. Stat. § 325D.43, et seq.

59. BreathableBaby is entitled to an injunction pursuant to Minn. Stat. § 325D.45 and all other appropriate relief available to it at law.

60. Summer Infant has willfully engaged in the described deceptive trade practicing knowing them to be deceptive. BreathableBaby should therefore be awarded its reasonable attorneys fees pursuant to Minn. Stat. § 325D.45.

**CLAIM V
COMMON LAW TRADEMARK INFRINGEMENT**

61. BreathableBaby repeats the allegations above as if fully set forth herein.

62. Summer Infant's acts complained of herein constitute trademark infringement in violation of the common law of Minnesota and other states. Summer Infant's acts complained of herein are likely to cause confusion, mistake and/or deception, including but not limited to confusion, mistake and/or deception regarding the source, origin, and/or affiliation of products sold by Summer Infant.

63. On information and belief, Summer Infant's use of BREATHEEASY BABY has caused actual confusion.

64. Summer Infant's acts complained of herein have been intentional, willful, and in bad faith. Summer Infant has deliberately disregarded BreathableBaby's trademark rights in its BREATHABLEBABY mark in an attempt to misappropriate BreathableBaby's reputation and goodwill and to deliberately cause confusion, mistake, and/or deception.

65. Summer Infant's acts have caused and continue to cause BreathableBaby to suffer damages in an amount to be proven at trial. Summer Infant's unlawful acts have

caused and continue to cause BreathableBaby irreparable injury to its business reputation and goodwill.

66. BreathableBaby has been and is being irreparably damaged and, unless Summer Infant is enjoined, BreathableBaby will continue to be so damaged.

**CLAIM VI
COMMON LAW UNFAIR COMPETITION**

67. BreathableBaby repeats the allegations above as if fully set forth herein.

68. Summer Infant's infringement of BreathableBaby's intellectual property and trademark rights, and other unfair and improper practices alleged herein, constitutes unfair competition under the common law of Minnesota and the laws of other states. All of Summer Infant's actions have been willful, deliberate and intentional.

69. Summer Infant's acts complained of herein are likely to cause confusion, mistake, and deception. Summer Infant has further misappropriated the goodwill, quality and innovation associated with BreathableBaby, its trademark, and its products.

70. On information and belief, Summer Infant has caused actual confusion to arise regarding the source, sponsorship, or performance of its products.

71. Summer Infant's acts have caused and will continue to cause BreathableBaby to suffer damages in an amount to be proven at trial. Summer Infant's unlawful acts have caused and continue to cause BreathableBaby irreparable injury to its business reputation and goodwill.

72. BreathableBaby has been and is being irreparably damaged and, unless Summer Infant is enjoined, BreathableBaby will continue to be so damaged.

PRAYER FOR RELIEF

WHEREFORE, BreathableBaby respectfully requests this Court:

A. To enter judgment that Summer Infant has infringed one or more claims of the '192 patent;

B. To enter an order preliminarily and permanently enjoining Summer Infant, and its officers, agents, servants, and employees, and all persons in active concert or participation with any of them, from infringing the '192 patent;

C. To enter an order preliminarily and permanently enjoining Summer Infant, and its officers, agents, servants, and employees, and all persons in active concert or participation with any of them, from using the BREATHEEASY BABY name or any other name, mark, trade name, or any other designation or origin which is confusingly similar to the BREATHABLEBABY mark, alone or in combination with other words or designs.

D. To enter an order preliminarily and permanently enjoining Summer Infant, and its officers, agents, servants, and employees, and all persons in active concert or participation with any of them, from owning, holding, maintaining, or registering any registered trademark, common law mark, service mark, or any other name, mark, trade name, or any other designation or origin which is confusingly similar to the BREATHABLEBABY mark, alone or in combination with other words or designs.

E. To enter an order preliminarily and permanently enjoining Summer Infant from making false, deceptive and unsubstantiated claims regarding its products, the source of the products or the sponsorship of the products, including but not limited to the

use of the term “breathable,” “meets recommended guidelines,” “Safe N’ Sound Sleeping Solutions,” “improves air flow,” and “reduces risk of suffocation and entanglement.”

F. To enter an order pursuant to 15 U.S.C. § 1118 to deliver for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in Summer Infant’s possession which violate BreathableBaby’s federal trademark rights or which are the subject of Lanham Act violations complained of herein.

G. To award BreathableBaby its damages in an amount sufficient to compensate BreathableBaby for Summer Infant’s infringement of the ‘192 patent, Summer Infant’s trademark infringement, Summer Infant’s unfair competition, and Summer Infant’s other acts complained of herein, together with costs and pre-judgment and post judgment interest;

H. An accounting be directed to determine Summer Infant’s profits resulting from Summer Infant’s acts complained of herein;

I. To declare this case to be exceptional under 35 U.S.C. § 285 and 15 U.S.C. § 1117 and to award BreathableBaby its attorneys fees, expenses, and costs incurred in this action;

J. To treble the damages awarded to BreathableBaby by reason of Summer Infant’s willful infringement of the ‘192 patent;

K. To treble the damages awarded to BreathableBaby by reason of Summer Infant’s deliberate and willful trademark infringement and violation of the Lanham Act;

L. To award BreathableBaby exemplary damages under Minnesota law for Summer Infant's intentional and deliberate violations of Minnesota statutes and Minnesota common law;

M. To award BreathableBaby such other and further relief, in law or in equity, as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, BreathableBaby respectfully requests a trial by jury of any and all issues on which a trial by jury is available under applicable law.

Dated: September 20, 2010

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